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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 216

[Docket No. 130221153-3153-01]

RIN 0648-BC78

Enhanced Document Requirements to Support Use of the Dolphin Safe Label on Tuna Products

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Proposed rule; request for comments.

SUMMARY: NMFS proposes to revise regulations under the Dolphin Protection Consumer Information Act (DPCIA) to enhance the requirements for documentation to support labels on tuna products that represent the product as dolphin-safe. This proposed rule would modify the requirements for the certifications that must accompany the Fisheries Certificate of Origin (FCO); change storage requirements related to dolphin-safe and non-dolphin-safe tuna on board fishing vessels; create new requirements for processors, other than tuna canners, of tuna product labeled dolphin-safe; and modify the reporting requirements associated with tracking domestic tuna canning and processing operations. This proposed rule is intended to better ensure dolphin-safe labels comply with the requirements of the DPCIA and to ensure that the United States satisfies its obligations as a member of the World Trade Organization (WTO).

DATES: Comments must be submitted in writing by [Insert date 30 days after date of publication in the FEDERAL REGISTER].

ADDRESSES: You may submit comments, identified by NOAA-NMFS-2013-0016, by any of the following methods:

- Electronic Submissions: Submit all electronic public comments via the Federal eRulemaking Portal: <http://www.regulations.gov/#!docketDetail;D=NOAA-NMFS-2013-0016>, click the “Comment Now!” icon, complete the required fields, and enter or attach your comments.
- Mail: Submit written comments to Rodney R. McInnis, Regional Administrator, NMFS Southwest Regional Office, 501 W. Ocean Blvd., Suite 4200, Long Beach, CA 90802.
- Fax: 562-980-4047, Attn: Rodney R. McInnis.

Instructions: Comments sent by any other method, to any other address or individual, or received after the end of the comment period, may not be considered by NMFS. All comments received are a part of the public record and will generally be posted for public viewing on www.regulations.gov without change. All personal identifying information (e.g., name, address, etc.), confidential business information, or otherwise sensitive information submitted voluntarily by the sender will be publicly accessible. NMFS will accept anonymous comments (enter "N/A" in the required fields if you wish to remain anonymous). Attachments to electronic comments will be accepted in Microsoft Word, Excel, or Adobe PDF file formats only.

Written comments regarding the burden-hour estimates or other aspects of the collection-of-information requirements contained in this proposed rule may be submitted to the NMFS Southwest Region (SWR) and by email to OIRA_Submission@omb.eop.gov, or faxed to (202) 395-7285.

FOR FURTHER INFORMATION CONTACT: William Jacobson, NMFS SWR, 562-980-4035.

SUPPLEMENTARY INFORMATION:

Background

Enacted in 1990, the DPCIA (16 U.S.C. 1385) established a dolphin-safe labeling standard for tuna products. The law addressed a Congressional finding that “consumers would like to know if the tuna they purchase is falsely labeled as to the effect of the harvesting of the tuna on dolphins.” The DPCIA sets out minimum criteria for when tuna product producers, importers, exporters, distributors, or sellers may label their product dolphin-safe or with any other similar term or symbol suggesting that the tuna contained in the product were harvested using a method of fishing that is not harmful to dolphins. Specifically, the DPCIA prohibits producers, importers, exporters, distributors, or sellers from labeling as dolphin-safe any tuna product that was harvested: (i) “on the high seas by a vessel engaged in driftnet fishing,” (ii) in the eastern tropical Pacific Ocean (ETP) by purse seine vessels with a carrying capacity of 400 short tons or greater unless accompanied by a captain’s statement and observer’s statement that no dolphins were intentionally encircled during the trip and no dolphins were killed or seriously injured during the set, or (iii) outside the ETP by purse seine vessels unless the captain certifies that no dolphins were intentionally encircled during the trip (16 U.S.C. 1385(d)(1)). The ETP is defined as the waters of the Pacific Ocean bounded by 40° N. latitude, 40° S. latitude, 160° W. longitude and the coastlines of North, Central and South America (50 CFR 216.3).

In addition to the above, if the Secretary of Commerce identifies a purse seine fishery that has a regular and significant association between dolphins and tuna similar to the ETP, then tuna products containing tuna harvested in such a fishery may not be labeled dolphin-safe, unless a captain and observer certify that no dolphins were killed or seriously injured in the sets in which the tuna were harvested (16 U.S.C. 1385(d)(1)(B)(i)). Furthermore, if the Secretary of

Commerce identifies any other fishery that has a regular and significant association between dolphins and tuna, then tuna products containing tuna harvested in such a fishery may not be labeled dolphin-safe, unless a captain and observer (if NOAA Fisheries determines that an observer statement would be “necessary”) certify that no dolphins were killed or seriously injured in the sets or other gear deployments in which the tuna were harvested (16 U.S.C. 1385(d)(1)(D)).

The minimum standards described above apply to any tuna product labeled dolphin-safe. The DPCIA further directs the Secretary of Commerce to develop an “official mark” that may be used to label tuna products as dolphin safe under 16 U.S.C. 1385(d)(3)(A), and requires that tuna product labeled dolphin-safe using other than the official mark may be used only if the tuna were harvested during a set or other gear deployment in which no dolphin was killed or seriously injured, regardless of the area of harvest or the type of gear used (16 U.S.C. 1385(d)(3)(C)(i)). Finally, NOAA Fisheries has broad authority to issue regulations to implement the DPCIA, including specifically the authority to establish a domestic tracking and verification program that provides for the tracking of tuna labeled dolphin-safe (whether using the official mark or any other mark) and to adjust such regulations as appropriate to implement an international tracking and verification program (16 U.S.C. 1385(f)).

Under current regulations, an FCO is required to accompany each importation of tuna product and is required to be submitted to NOAA Fisheries. The dolphin-safe status of the importation is declared on the FCO by the exporter and is endorsed by the importer. For tuna caught by ETP large purse seine vessels, current regulations require, as a condition of labeling tuna dolphin-safe, that the importer attach a certification from the captain and an observer on board the vessel that no dolphins were killed or seriously injured in the sets in which the tuna

were caught, and that no purse seine net was intentionally deployed on or used to encircle dolphins during the fishing trip in which the tuna were caught. For vessels using purse seine gear outside the ETP, current regulations require, as a condition of labeling tuna dolphin-safe, that the importer attach a certification from the captain that no purse seine net was intentionally deployed on or used to encircle dolphins during the fishing trip in which the tuna were caught. Also under current regulations, domestic tuna canners are required to submit to NOAA Fisheries monthly reports, which include the pertinent information found on an FCO, as well as additional vessel and transshipment information not found on an FCO, for all tuna received at the plant.

In 2008, Mexico initiated WTO dispute settlement proceedings challenging the U.S. dolphin-safe labeling scheme as a violation of provisions of the WTO's General Agreement on Tariffs and Trade 1994 and Agreement on Technical Barriers to Trade (TBT Agreement). Mexico challenged three U.S. measures: the DPCIA, Department of Commerce DPCIA regulations (50 CFR 216.91 through 216.92), and a federal court decision (Earth Island Institute v. Hogarth, 494 F.3d 757 (9th Cir. 2007)). The challenged measures establish conditions under which tuna products may voluntarily be labeled dolphin-safe. On June 13, 2012, the WTO Dispute Settlement Body (DSB) adopted the WTO panel and Appellate Body reports finding that the U.S. dolphin-safe labeling scheme (including the regulations that would be amended in this proposed rule) accords less favorable treatment to Mexican tuna products and therefore is inconsistent with Article 2.1 of the TBT Agreement. This conclusion was based on a finding that the U.S. measures did not set conditions for use of the label in a way that reflects the risks faced by dolphins in different oceans.

Proposed Action

This proposed rule would revise regulations at 50 CFR 216.91, to impose additional requirements regarding certifications to support the labeling of tuna products as dolphin-safe. This proposed rule would better ensure dolphin-safe labels comply with the requirements of the DPCIA, and would ensure conformity with U.S. WTO obligations by addressing the WTO Dispute Settlement Body's ruling. If adopted, this rule would require, as a condition of labeling tuna dolphin-safe, that the captain of the vessel and, where applicable, either a qualified and authorized observer or an authorized representative of a nation participating in the observer program on board the vessel, certify that no dolphins were killed or seriously injured in the sets or other gear deployments in which the tuna were caught. In addition, for vessels using purse seine gear outside the ETP, the rule would require, if applicable, the observer or an authorized representative of a nation participating in the observer program to certify that no purse seine net was intentionally deployed on or used to encircle dolphins during the fishing trip in which the tuna were caught as a condition of labeling the tuna dolphin-safe.

This proposed rule would also revise regulations at 50 CFR 216.93 to change storage requirements related to dolphin-safe and non-dolphin-safe tuna on board fishing vessels; to create requirements for processors, other than tuna canners, of tuna product labeled dolphin-safe; and to include modifications to a monthly receipts report that domestic tuna canners currently submit to NMFS.

Dolphin-safe Labeling Standards

Under current regulations at 50 CFR 216.91(a), statements and/or certifications must accompany any tuna product labeled dolphin-safe that includes tuna harvested: by a large purse seine vessel (greater than 400 short tons (362.8 metric tons (mt)) carrying capacity) in the ETP; by a purse seine vessel of any size outside of the ETP; or in any other fishery, identified by the

Secretary of Commerce, where there is regular and significant mortality or serious injury of dolphins.

The Secretary of Commerce has not determined, to date, that any other fishery has a regular and significant association between dolphins and tunas similar to the association between dolphins and tuna in the ETP, or regular and significant mortality or serious injury of dolphins, and therefore NOAA Fisheries has not imposed the additional requirements for captain's and (where applicable) observer's statements described in paragraphs (d)(1)(B)(i) and (d)(1)(D) of the DPCIA. Furthermore, while paragraph (d)(3)(C)(i) of the DCPIA forbids the use of alternative dolphin-safe marks on any tuna product harvested during a gear deployment in which dolphins were killed or seriously injured, current regulations do not require a captain's or observer's statement to document that no such mortality or injury has occurred. The proposed changes are intended to better ensure consistency with the requirements of the DPCIA, and to ensure conformity with U.S. WTO obligations. This rule is issued under the Secretary's broad regulatory authority to implement the DPCIA and particularly to implement a domestic tuna tracking and verification program (see paragraph (f) of the DPCIA, 16 U.S.C. §1385(f)) to ensure that tuna is not falsely labeled as to the effect of harvesting of the tuna on dolphins. It would expand the current requirement that captains, and in some cases observers, provide a statement that "no dolphins were killed or seriously injured" for all tuna product labeled dolphin-safe, not just tuna harvested by large purse seine in the ETP. NMFS proposes to revise 50 CFR 216.91(a) to require that for all tuna product labeled dolphin-safe (other than that harvested by large ETP purse seine vessels or vessels engaged in large-scale driftnet fishing, which would remain subject to current requirements): (1) the captain of the vessel harvesting tuna provide a statement that no dolphins were killed or seriously injured in the sets or other gear deployments

in which the tuna were caught; (2) an authorized and qualified observer on board the vessel (if any) or an authorized representative of the nation participating in an authorized and qualified observer program (if any) provide a statement that no dolphins were killed or seriously injured in the sets or other gear deployments in which the tuna were caught and, if applicable, no purse seine net was intentionally deployed on or used to encircle dolphins during the fishing trip in which the tuna were caught; and (3) tuna caught in sets or other gear deployments designated as dolphin-safe be stored separately from tuna caught in non-dolphin-safe sets or other gear deployments from the time of capture through unloading.

NMFS will identify fisheries that are monitored by on-board observers participating in a national or international observer program that the Assistant Administrator, NOAA, has determined are qualified and authorized by the program authority to certify that no dolphins were killed or seriously injured in the sets or other gear deployments in which the tuna were caught. The Assistant Administrator's determination will be announced publicly through a notice published in the Federal Register and also on the NMFS Southwest Region website at <http://swr.nmfs.noaa.gov>. Only tuna harvested on fishing trips beginning after the effective date of the final rule will be subject to the new requirements for captain and, where applicable, observer statements. These new information collections (i.e., all the new statements and certifications), will become effective only after review and approval by the Office of Management and Budget (OMB) under the Paperwork Reduction Act (PRA), 44 U.S.C. 3501 et seq.

Any producer, importer, exporter, distributor, or seller of tuna product labeled under these proposed regulations would be subject to enforcement under section 5 of the Federal Trade Commission Act for including a dolphin-safe label on tuna product in the United States that fails

to meet the standards for use of a dolphin-safe label as set forth in paragraph (d) of the DPCIA, 16 USC §1385(d). Furthermore, the violations of the requirements under this proposed rule are enforceable under 18 U.S.C. §1001(a), which authorizes the imposition of penalties including fines or imprisonment for anyone who knowingly and willfully (1) falsifies, conceals, or covers up by any trick, scheme, or device a material fact; (2) makes any materially false, fictitious, or fraudulent statement or representation; or (3) makes or uses any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry.

Tracking and Verification Program

NMFS proposes to revise the regulations at 50 CFR 216.93 governing the tuna tracking and verification as it relates to U.S. citizens and U.S. vessels. First, this rule would remove the words “purse seine” from the introductory paragraph of 50 CFR 216.93, because all tuna included, or intended to be included, in tuna product labeled dolphin-safe are subject to the requirements, not only tuna harvested using the purse seine fishing method.

NMFS also proposes adding a paragraph heading to 50 CFR 216.93(c)(1) to clarify that proposed subparagraphs under 50 CFR 216.93(c)(1) pertain to ETP large purse seine vessels. NMFS proposes to redesignate 50 CFR 216.93(c)(1) as paragraph 216.93(c)(1)(i), and to revise the paragraph by removing the words “ETP fishing trips” and inserting instead the phrase “fishing trips, any part of which included fishing in the ETP,” to clarify the meaning of “ETP fishing trip.” This rule would require that tuna product labeled dolphin-safe in the United States that was harvested by purse seine gear anywhere (other than large purse seine vessels in the ETP, which would remain subject to the current regulations), be stored separately from tuna caught in non-dolphin-safe sets from the time of capture through unloading. Under this rule, tuna caught in sets where a dolphin died or was seriously injured must be stored in a well designated for that

trip as non-dolphin-safe by the captain or, where applicable, by a qualified and authorized observer under § 216.91. Any tuna loaded into a well previously designated on the trip as non-dolphin-safe would be considered non-dolphin-safe tuna. The captain or a qualified and authorized observer under § 216.91 would change the designation of a dolphin-safe well to non-dolphin-safe if any tuna loaded into the well were captured in a set in which a dolphin died or was seriously injured. If a purse seine vessel has only one storage well, then the rule would require the use of netting or other material to keep dolphin-safe tuna and non-dolphin-safe tuna physically separate. NMFS is seeking comments from the industry on this concept of physically separating dolphin-safe tuna and non-dolphin-safe tuna through the use of netting or other material on purse seine vessels with only one storage well.

The proposed rule would require tuna offloaded to trucks, storage facilities, or carrier vessels to be loaded or stored in such a way as to maintain and safeguard the identification of the dolphin-safe or non-dolphin-safe designation of the tuna as it left the fishing vessel. NMFS does not expect a significant cost burden increase to operators of trucks, storage facilities, or carrier vessels in order to keep dolphin-safe tuna and non-dolphin-safe tuna separate, as the industry already uses methods (e.g., the use of netting, tarps, or separate totes or storage containers) to keep offloaded tuna sourced from different suppliers separate. Revisions to 50 CFR 216.93(c) are intended to better ensure that dolphin-safe related requirements are met.

NMFS proposes to revise the regulations that pertain to tuna harvested by vessels other than purse seine vessels, at 50 CFR 216.93(c)(3). This rule would require that tuna caught in sets or other gear deployments designated as dolphin-safe to be stored separately from tuna caught in non-dolphin-safe sets or other gear deployments from the time of capture through unloading. Tuna caught in sets or other gear deployments where a dolphin died or was seriously injured

would be considered non-dolphin-safe tuna, and would be required to be kept physically separate from the dolphin-safe tuna by using netting, other material, or separate storage areas. The rule would require tuna offloaded to trucks, storage facilities, or carrier vessels to be loaded or stored in such a way as to maintain and safeguard the identification of the dolphin-safe or non-dolphin-safe designation of the tuna as it left the fishing vessel. The new requirements in 50 CFR 216.93(c)(3) are intended to better ensure that dolphin-safe related requirements are met.

NMFS proposes to remove the words “ETP caught” from 50 CFR 216.93(d)(1), so as not to limit tracking of domestic cannery operations to only ETP harvested tuna and tuna products.

Other proposed revisions include modifications to the monthly receipts report domestic canners submit under 50 CFR 216.93(d)(2)(i). This proposed rule would require the report to: (1) declare whether the tuna is eligible to be labeled dolphin-safe; (2) include the gear type of the harvesting method; and (3) enclose certifications required by 50 CFR 216.91 when the processor indicates the tuna is eligible to be labeled dolphin-safe under 50 CFR 216.91. These revisions are subject to review and approval by OMB under the PRA, 44 U.S.C. 3501 et seq.

NMFS also proposes to add requirements at 50 CFR 216.93(e) for tuna processors, other than tuna canners, to submit to NOAA monthly receipt reports: (1) declaring whether the tuna is eligible to be labeled dolphin-safe; (2) identifying the gear type of the harvesting method; and (3) enclosing certifications required by 50 CFR 216.91 when the processor indicates the tuna is eligible to be labeled dolphin-safe under 50 CFR 216.91. These provisions would impose similar requirements on both tuna canners and other tuna processors. As with the new reporting requirements for tuna canners, these revisions are subject to review and approval by OMB under the PRA, 44 U.S.C. 3501 et seq. As a result of the insertion of this new paragraph, existing

paragraphs at 50 CFR 216.93(e), (f), and (g) are proposed to be redesignated to paragraphs 50 CFR 216.93(f), (g), and (h).

Fisheries Certificates of Origin and Associated Certifications

To import tuna, tuna products, and certain other fish products into the United States, current regulations at 50 CFR 216.24(f)(3)(i) and (ii) require FCOs and associated certifications to be submitted to both U.S. Customs and Border Protection (CBP; Department of Homeland Security) and NMFS Southwest Region. The proposed changes in the dolphin-safe documentation requirements described above would also require NOAA to revise the FCOs. Specifically, the FCOs would direct importers to attach a captain's statement and, where applicable, a statement either by the observer or an authorized representative of a nation participating in the observer program, using information from the observer, certifying that no dolphins were killed or seriously injured in the sets or other gear deployments in which the tuna were caught, for: (1) tuna not harvested with a purse seine net; (2) tuna harvested with a purse seine net outside the ETP; and (3) tuna harvested in the ETP by a purse seine vessel having a carrying capacity of 400 short tons (362.8 mt) or less. The revisions to the FCOs are subject to review and approval by OMB under the PRA, 44 U.S.C. 3501 et seq.

Classification

The NMFS Assistant Administrator has determined that this proposed rule is consistent with the DPCIA and other applicable laws, subject to further consideration after public comment.

This rule has been determined to be not significant for the purposes of E.O. 12866 by the OMB Office of Information and Regulatory Affairs.

Pursuant to 5 U.S.C. 605, part of the Regulatory Flexibility Act (RFA; 5 U.S.C. chapter 5), the Chief Counsel for Regulation of the Department of Commerce certified to the Chief

Counsel for Advocacy of the Small Business Administration (SBA) that this proposed rule, if adopted, would not have a significant economic impact on a substantial number of small entities.

The basis for this certification is presented in the following paragraphs.

Description of Affected Entities and Small Entities

For purposes of the RFA, we assess the effects of the proposed regulations to three classes of entities: (1) owners of U.S. tuna fishing vessels where the harvested tuna is labeled dolphin-safe and is sold in the United States; (2) U.S. tuna processors; and (3) importers of tuna and tuna products labeled dolphin-safe. We used the SBA's size standards established at 13 CFR part 121 to define the affected small entities: fishing vessels, tuna processors, and tuna importers. Using those standards, fishing vessels with less than \$4 million in average annual receipts, tuna processors with fewer than 500 employees, and importers with fewer than 100 employees are considered small entities.

U.S. purse seine vessels that fish for tuna destined to become tuna product are divided into two size groups: (1) Vessels greater than 400 st (362.8 mt) carrying capacity ("large" vessels); and (2) vessels of 400 st (362.8 mt) carrying capacity or less ("small" vessels). Large vessels typically exceed \$4 million in annual receipts, whereas small vessels have less than \$4 million in annual receipts and would be considered small entities. From 2011 – 2012, the U.S. purse seine fleet, all of which fished in the Pacific Ocean, averaged 39 large vessels and 7 small vessels. About 1,930 U.S. non-purse seine commercial fishing vessels are authorized to fish for tuna in the Pacific Ocean per year, including: (1) vessels under Pacific Highly Migratory Species vessel permits (about 1,766 vessels); and (2) vessels based in Hawaii and the U.S. Pacific Islands, under High Seas Fishing Compliance Act permits (about 175 vessels). All of these are considered small entities in this analysis, and have less than \$4 million in annual receipts.

There are 19 tuna canning manufacturers in the United States. Of these, 16 are considered small businesses, because they have fewer than 500 employees.

NMFS is unaware of any domestic tuna processor, other than canning operations, that labels tuna product as dolphin-safe.

There are an estimated 430 U.S. importers of tuna and tuna products per year. Of these, about 380 importers are considered small businesses, because they have fewer than 100 employees.

Impacts on Affected Entities

The proposed rule, if implemented, would apply additional documentation requirements to all three classes of affected entities; none of these reporting requirements would result in a significant economic effect. The time needed to gather and submit a written statement by the captain of the harvesting vessel and by the observer on board the vessel or by an authorized representative, if applicable, would be minimal (about 5 minutes each). An additional cost to provide the written statements would be about \$0.10 for each one page written statement. Moreover, any additional costs to any entity resulting from this rule will be small (e.g. the cost associated with two pieces of netting or tarps, etc. for use in storage separation). Accordingly, as it pertains to the RFA, this rule will not have a significant economic impact on a substantial number of small entities. As a result, an initial regulatory flexibility analysis is not required and none has been prepared.

This proposed rule contains two collection-of-information requirements subject to review and approval by OMB under the PRA under control numbers 0648-0335 and 0648-0387. Revision of OMB control number 0648-0335, titled “Fisheries Certificate of Origin,” if approved, modifies the dolphin-safe status section of the FCO. The labor and cost burden due to

this proposed rule on control number 0648-0335 is estimated to affect approximately 13,000 responses annually from 430 respondents. The cost and labor burdens are estimated to increase by \$0.30 and 5 minutes respectively, per response. Revision of OMB control number 0648-0387, titled “International Dolphin Conservation Program,” if approved, requires information from tuna canners and tuna processors, other than canners, about the eligibility of tuna to be labeled dolphin-safe; the gear type used to harvest the tuna; and will contain certifications required by 50 CFR 216.91. The labor and cost burden due to this proposed rule on control number 0648-0387 is estimated to affect approximately 72 responses annually from 19 respondents. The cost and labor burdens are estimated to increase by \$0.50 and 5 minutes respectively, per response. These collections have been submitted to OMB for approval. Public reporting burden estimates include the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection information.

Public comment is sought regarding: whether this proposed collection-of-information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; the accuracy of the burden estimate; ways to enhance the quality, utility, and clarity of the information to be collected; and ways to minimize the burden of the collection-of-information, including through the use of automated collection techniques or other forms of information technology. Send comments on these or any other aspects of the collection-of-information to NMFS Southwest Region at the ADDRESSES above, and by e-mail to OIRA_Submission@omb.eop.gov or fax to (202) 395-7285.

Notwithstanding any other provision of the law, no person is required to respond to, nor shall any person be subject to a penalty for failure to comply with a collection-of-information

subject to the requirements of the PRA, unless that collection-of-information displays a currently valid OMB Control Number.

List of Subjects in 50 CFR Part 216

Commercial fisheries, Food labeling, Imports, Marine mammals, Reporting and recordkeeping requirements, Seafood.

Dated: April 2, 2013.

Alan D. Risenhoover,
Director, Office of Sustainable Fisheries,
performing the functions and duties of the
Deputy Assistant Administrator for Regulatory Programs,
National Marine Fisheries Service.

For the reasons set out in the preamble, 50 CFR part 216, subpart H is proposed to be amended as follows:

PART 216—REGULATIONS GOVERNING THE TAKING AND IMPORTING OF MARINE MAMMALS

1. The authority citation for 50 CFR part 216, subpart H, continues to read as follows:

Authority: 16 U.S.C. 1385

2. In § 216.91, revise paragraphs (a)(2)(ii) and (a)(4), and add a new paragraph (a)(5) to read as follows:

§ 216.91 Dolphin-safe labeling standards.

(a) * * *

(2) * * *

(ii) In any other fishery unless the products are accompanied as described in § 216.93(d), (e), or (f), as appropriate, by:

(A) A written statement executed by the Captain of the vessel certifying that no purse seine net was intentionally deployed on or used to encircle dolphins during the fishing trip in which the tuna were caught, and that no dolphins were killed or seriously injured in the sets in which the tuna were caught; and

(B) Where the Assistant Administrator has determined that observers participating in a national or international observer program are qualified and authorized to certify that no purse seine net was intentionally deployed on or used to encircle dolphins during the fishing trip in which the tuna were caught, and that no dolphins were killed or seriously injured in the sets in which the tuna were caught, and where such an observer is on board the vessel, a written statement executed by the observer, or by an authorized representative of a nation participating in the observer program based on information from the observer, certifying that no purse seine net was intentionally deployed on or used to encircle dolphins during the fishing trip in which the tuna were caught and that no dolphins were killed or seriously injured in the sets in which the tuna were caught. Any determination by the Assistant Administrator shall be announced in a notice published in the Federal Register. Determinations under this paragraph (a)(2)(ii)(B) will also be publicized on the website of the NMFS Southwest Region (<http://swr.nmfs.noaa.gov/>).

* * * * *

(4) Other fisheries. By a vessel in a fishery other than one described in paragraphs (a)(1) through (a)(3) of this section unless such product is accompanied as described in § 216.93(d), (e), or (f), as appropriate, by:

(i) A written statement executed by the Captain of the vessel certifying that no dolphins were killed or seriously injured in the sets or other gear deployments in which the tuna were caught;

(ii) Where the Assistant Administrator has determined that observers participating in a national or international observer program are qualified and authorized to certify that no dolphins were killed or seriously injured in the sets or other gear deployments in which the tuna were caught, and where such an observer is on board the vessel, a written statement executed by the observer, or by an authorized representative of a nation participating in the observer program based on information from the observer, certifying that no dolphins were killed or seriously injured in the sets or other gear deployments in which the tuna were caught. Any determination by the Assistant Administrator shall be announced in a notice published in the Federal Register. Determinations under this subparagraph will also be publicized on the website of the NMFS Southwest Region (<http://swr.nmfs.noaa.gov/>); and

(iii) In addition to the requirements of paragraphs (a)(4)(i) and (ii) of this section, in any other fishery that is identified by the Assistant Administrator as having a regular and significant mortality or serious injury of dolphins, a written statement executed by an observer participating in a national or international program acceptable to the Assistant Administrator, that no dolphins were killed or seriously injured in the sets or other gear deployments in which the tuna were

caught, provided that the Assistant Administrator determines that such an observer statement is necessary.

(5) All fisheries. On a fishing trip during which any dolphin was killed or seriously injured, unless the tuna labeled dolphin-safe was caught in a set or other gear deployment was stored separately from tuna caught in non-dolphin-safe sets or other gear deployments by the use of netting, other material, or separate storage areas from the time of capture through unloading. If a purse seine vessel has more than one well used to store tuna, all tuna inside a well shall be considered non-dolphin-safe, if at any time non-dolphin-safe tuna is loaded into the well, regardless of the use of netting or other material inside the well.

* * * * *

3. Section 216.93 is revised to read as follows:

§ 216.93 Tracking and verification program.

The Administrator, Southwest Region, has established a national tracking and verification program to accurately document the dolphin-safe condition of tuna, under the standards set forth in §§ 216.91 and 216.92. The tracking program includes procedures and reports for use when importing tuna into the United States and during U.S. fishing, processing, and marketing in the United States and abroad. Verification of tracking system operations is attained through the establishment of audit and document review requirements. The tracking program is consistent with the international tuna tracking and verification program adopted by the Parties to the Agreement on the IDCP.

(a) Tuna tracking forms. Whenever a U.S. flag tuna purse seine vessel of greater than 400 st (362.8 mt) carrying capacity fishes in the ETP, IDCP approved Tuna Tracking Forms (TTFs), bearing a unique number assigned to that trip, are used by the observer to record every set made

during that trip. One TTF is used to record dolphin-safe sets and a second TTF is used to record non-dolphin-safe sets. The information entered on the TTFs following each set includes the date, well number, weights by species composition, estimated tons loaded, and additional notes, if any. The observer and the vessel engineer initial the entry as soon as possible following each set, and the vessel captain and observer review and sign both TTFs at the end of the fishing trip certifying that the information on the forms is accurate. TTFs are confidential official documents of the IDCP, consistent with Article XVIII of the Agreement on the IDCP, and the Agreement on the IDCP Rules of Confidentiality.

(b) Dolphin-safe certification. Upon request, the Office of the Administrator, Southwest Region, will provide written certification that tuna harvested by U.S. purse seine vessels greater than 400 st (362.8 mt) carrying capacity is dolphin-safe, but only if NMFS' review of the TTFs for the subject trip shows that the tuna for which the certification is requested is dolphin-safe under the requirements of the Agreement on the IDCP and U.S. law.

(c) Tracking fishing operations. (1) ETP large purse seine vessel. In the ETP by a purse seine vessel of greater than 400 st (362.8 mt) carrying capacity:

(i) During fishing trips, any part of which included fishing in the ETP, by purse seine vessels greater than 400 st (362.8 mt) carrying capacity, tuna caught in sets designated as dolphin-safe by the vessel observer must be stored separately from tuna caught in non-dolphin-safe sets from the time of capture through unloading. Vessel personnel will decide into which wells tuna will be loaded. The observer will initially designate whether each set is dolphin-safe or not, based on his/her observation of the set. The observer will initially identify a vessel fish well as dolphin-safe if the first tuna loaded into the well during a trip was captured in a set in which no dolphin died or was seriously injured. The observer will initially identify a vessel fish

well as non-dolphin-safe if the first tuna loaded into the well during a trip was captured in a set in which a dolphin died or was seriously injured. Any tuna loaded into a well previously designated non-dolphin-safe is considered non-dolphin-safe tuna. The observer will change the designation of a dolphin-safe well to non-dolphin-safe if any tuna are loaded into the well that were captured in a set in which a dolphin died or was seriously injured.

(ii) The captain, managing owner, or vessel agent of a U.S. purse seine vessel greater than 400 st (362.8 mt) returning to port from a trip, any part of which included fishing in the ETP, must provide at least 48 hours' notice of the vessel's intended place of landing, arrival time, and schedule of unloading to the Administrator, Southwest Region.

(iii) If the trip terminates when the vessel enters port to unload part or all of its catch, new TTFs will be assigned to the new trip, and any information concerning tuna retained on the vessel will be recorded as the first entry on the TTFs for the new trip. If the trip is not terminated following a partial unloading, the vessel will retain the original TTFs and submit a copy of those TTFs to the Administrator, Southwest Region, within 5 working days. In either case, the species and amount unloaded will be noted on the respective originals.

(iv) Tuna offloaded to trucks, storage facilities, or carrier vessels must be loaded or stored in such a way as to maintain and safeguard the identification of the dolphin-safe or non-dolphin-safe designation of the tuna as it left the fishing vessel.

(v) The handling of TTFs and the tracking and verification of tuna caught in the Convention Area by a U.S. purse seine vessel greater than 400 st (362.8 mt) carrying capacity shall be conducted consistent with the international tuna tracking and verification program adopted by the Parties to the Agreement on the IDCP.

(2) Purse seine vessel other than ETP large purse seine vessel. This paragraph (c)(2) applies to tuna product labeled dolphin-safe that includes tuna harvested in the ETP by a purse seine vessel of 400 st (362.8 mt) or less carrying capacity or by a purse seine vessel outside the ETP of any carrying capacity.

(i) Tuna caught in sets designated as dolphin-safe must be stored separately from tuna caught in non-dolphin-safe sets from the time of capture through unloading. Tuna caught in sets where a dolphin died or was seriously injured must be stored in a well designated as non-dolphin-safe by the captain or, where applicable, by a qualified and authorized observer under § 216.91. Any tuna loaded into a well previously designated non-dolphin-safe is considered non-dolphin-safe tuna. The captain or, where applicable, a qualified and authorized observer under § 216.91, will change the designation of a dolphin-safe well to non-dolphin-safe if any tuna are loaded into the well that were captured in a set in which a dolphin died or was seriously injured. If a purse seine vessel has only one well used to store tuna, dolphin-safe tuna must be kept physically separate from non-dolphin-safe tuna by using netting or other material. If a purse seine vessel has more than one well used to store tuna, all tuna inside a well shall be considered non-dolphin-safe, if at any time non-dolphin-safe tuna is loaded into the well, regardless of the use of netting or other material inside the well.

(ii) Tuna offloaded to trucks, storage facilities, or carrier vessels must be loaded or stored in such a way as to maintain and safeguard the identification of the dolphin-safe or non-dolphin-safe designation of the tuna as it left the fishing vessel.

(3) Other vessels. This paragraph (c)(3) applies to tuna product labeled dolphin-safe that includes tuna harvested by a vessel other than ones described in paragraphs (c)(1) or (c)(2) of this section:

(i) Tuna caught in sets or other gear deployments designated as dolphin-safe must be stored separately from tuna caught in non-dolphin-safe sets or other gear deployments from the time of capture through unloading. Dolphin-safe tuna must be kept physically separate from non-dolphin-safe tuna by using netting, other material, or separate storage areas. The captain or, where applicable, a qualified and authorized observer under § 216.91, must designate the storage areas for dolphin-safe and non-dolphin-safe tuna.

(ii) Tuna offloaded to trucks, storage facilities, or carrier vessels must be loaded or stored in such a way as to maintain and safeguard the identification of the dolphin-safe or non-dolphin-safe designation of the tuna as it left the fishing vessel.

(d) Tracking cannery operations. (1) Whenever a U.S. tuna canning company in the 50 states, Puerto Rico, or American Samoa receives a domestic or imported shipment of tuna for processing, a NMFS representative may be present to monitor delivery and verify that dolphin-safe and non-dolphin-safe tuna are clearly identified and remain segregated. Such inspections may be scheduled or unscheduled, and canners must allow the NMFS representative access to all areas and records.

(2) Tuna processors must submit a report to the Administrator, Southwest Region, of all tuna received at their processing facilities in each calendar month whether or not the tuna is actually canned or stored during that month. Monthly cannery receipt reports must be submitted electronically or by mail before the last day of the month following the month being reported. Monthly reports must contain the following information:

(i) Domestic receipts: whether the tuna is eligible to be labeled dolphin-safe under § 216.91, species, condition (round, loin, dressed, gilled and gutted, other), weight in short tons to the fourth decimal, ocean area of capture (ETP, western Pacific, Indian, eastern and western

Atlantic, other), catcher vessel, gear type, trip dates, carrier name, unloading dates, and location of unloading. Where the processor indicates the tuna is eligible to be labeled dolphin-safe under § 216.91, it must enclose the certifications required by that section.

(ii) Import receipts: In addition to the information required in paragraph (d)(2)(i) of this section, a copy of the FCO for each imported receipt must be provided.

(3) Tuna processors must report on a monthly basis the amounts of ETP-caught tuna that were immediately utilized upon receipt or removed from cold storage. This report may be submitted in conjunction with the monthly report required in paragraph (d)(2) of this section. This report must contain:

(i) The date of removal from cold storage or disposition;

(ii) Storage container or lot identifier number(s) and dolphin-safe or non-dolphin-safe designation of each container or lot; and

(iii) Details of the disposition of fish (for example, canning, sale, rejection, etc.).

(4) During canning activities, non-dolphin-safe tuna may not be mixed in any manner or at any time during processing with any dolphin-safe tuna or tuna products and may not share the same storage containers, cookers, conveyers, tables, or other canning and labeling machinery.

(e) Tracking processor operations other than cannery operations. U.S. tuna processors other than cannery operations engaged in processing tuna products, including frozen, dried, or smoked tuna products, must submit a report to the Administrator, Southwest Region that includes the information set out in paragraphs (d)(2) and (d)(3) of this section on a monthly basis for all tuna received at their processing facilities that will be included in any tuna product labeled dolphin-safe.

(f) Tracking imports. All tuna products, except fresh tuna, that are imported into the United States must be accompanied as described in § 216.24(f)(3) by a properly certified FCO as required by § 216.24(f)(2). For tuna tracking purposes, copies of FCOs and associated certifications must be submitted by the importer of record to the Administrator, Southwest Region, within 10 calendar days of the shipment's entry into the commerce of the United States as required by § 216.24(f)(3)(ii).

(g) Verification requirements. (1) Record maintenance. Any exporter, transshipper, importer, processor, or wholesaler/distributor of any tuna or tuna products must maintain records related to that tuna for at least 2 years. These records include, but are not limited to: FCOs and required certifications, any reports required in paragraphs (a), (b), (d) and (e) of this section, invoices, other import documents, and trip reports.

(2) Record submission. Within 10 calendar days of receiving a shipment of tuna or tuna products, any exporter, transshipper, importer, processor, or wholesaler/distributor of tuna or tuna products must submit to the Administrator, Southwest Region, all corresponding FCOs and required certifications for those tuna or tuna products.

(3) Audits and spot checks. Upon request of the Administrator, Southwest Region, any exporter, transshipper, importer, processor, or wholesaler/distributor of tuna or tuna products must provide the Administrator, Southwest Region, timely access to all pertinent records and facilities to allow for audits and spot-checks on caught, landed, stored, and processed tuna.

(h) Confidentiality of proprietary information. Information submitted to the Assistant Administrator under this section will be treated as confidential in accordance with NOAA Administrative Order 216-100 "Protection of Confidential Fisheries Statistics."

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